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The Cost of Sunshine: The Threat to Public Employee Privacy Posed by the California Public Records Act

Alexandra B. Andreen*

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”

– California Public Records Act¹

INTRODUCTION

Defining the scope of the right to privacy has been a polarizing issue since that right was summoned from the shadows of other specific protections in the United States Constitution.² This issue has been in sharp focus at the intersection between the public sector and the private individual. In light of vehement demands for government transparency, it has become increasingly challenging to balance the public’s desire for knowledge about government actions with individual public employees’ rights to privacy. These competing interests are both compelling; however, in the past decade the balance has seemingly tipped in favor of government transparency. Taxpayers have become wary of what goes on behind closed doors. Burned by blatant examples of corruption and exploitation by public officials,³ citizens are demanding to be made privy to the decisions made by their leaders, even when doing so tramples

*J.D., Chapman University Dale E. Fowler School of Law, May 2015. Thank you to everyone who helped throughout the process of writing this Comment, especially Professor Kenneth Stahl and the *Chapman Law Review*. I dedicate this Comment to my law school angels, true friends; to Matthew, my rock and my Partner; and to my parents, whose passion for the legal profession has always been my inspiration. I follow proudly in their footsteps.

¹ California Public Records Act, CAL. GOV’T CODE § 6250 (West 2014).

² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³ Perhaps the most shocking recent example of government corruption left unchecked in the State of California was the scandal in the City of Bell that was brought to the public consciousness in 2010 when the Los Angeles Times reported that part-time government officials for the city were making almost \$100,000 a year. See *Timeline Bell: ‘Corruption on Steroids,’* L.A. TIMES, <http://timelines.latimes.com/bell/> (last updated Apr. 16, 2014).

the individual privacy rights of those government officials. An example that illustrates the critical nature of drawing a line to protect employee privacy can be seen in the following scenario.

Groups aimed at finding target markets for product sales have begun using public record requests to locate individuals to solicit. For example, a company that markets educational supplies and programs to teachers has recently filed record requests in California to obtain names of all full-time teachers in certain school districts.⁴ Another company, based in New Jersey, offers access to a database of public employee contact information for marketing purposes in exchange for a fee.⁵ This type of mining and selling of employee information for commercial purposes has also been made possible by groups like Transparent California, which collects salary information on California public employees and posts it online.⁶ This information can then be used by companies looking for potential consumers for their products. For example, imagine Mercedes Benz begins calling all public employees who make over \$100,000 a year to give them a special offer on the new C-Class.⁷

This troublesome invasion of privacy has been made possible by the continued narrowing of public employee privacy that has occurred in recent years by California courts' interpretations of the California Public Records Act. Increasingly, California courts have narrowly construed the statutory provisions of the Act aimed at protecting employee privacy and favored the disclosure of records in order to further the aim of government transparency. A recent case in the California Court of Appeal highlights the tension between the competing interests of transparency and privacy and suggests that we may be reaching a halt in this progression of narrowed privacy rights for public employees.⁸

⁴ Requests have been filed in several school districts in the State of California by a commercial venture operating out of Texas.

⁵ See DATA TACT, www.datatact.com (last visited May 11, 2015).

⁶ TRANSPARENT CALIFORNIA, <http://transparentcalifornia.com> (last visited Apr. 18, 2015).

⁷ While this type of blatant commercialism is restricted by the public records act with respect to disclosure of records related to those who are arrested or those who are victims of crimes by requiring requesters to declare under penalty of perjury that the request is either made by a licensed investigator or for a scholarly, journalistic, political, or governmental purpose, such protections are not in place for public employees whose private information is sought. CAL. GOV'T CODE § 6254(f)(3) (West 2014).

⁸ Order After Hearing on March 15, 2013, *Smith v. City of San Jose* (Cal. Super. Ct. 2013) (No. 1-09-CV-150427), available at <https://www.sanjoseca.gov/DocumentCenter/View/14044>.

In December of 2008, the Mayor of San Jose announced an aggressive plan to reinvigorate downtown San Jose.⁹ The plan involved investing over six million dollars of city funds into redevelopment of the San Pedro Square to create a thriving open-air urban market.¹⁰ With a proposal to redirect street improvement funds and throw another two and a half million dollars from the city's coffers at the project,¹¹ citizens, such as Ted Smith, started asking questions.¹² Smith made several requests for public records regarding the San Pedro Square redevelopment project between September 2008 and January 2009.¹³ The city responded to the requests promptly and turned over most of the documents requested; however, the city refused to turn over voicemails, emails, and text messages sent or received on personal accounts on private electronic devices used by the mayor of San Jose, city council members, and their staff.¹⁴ In June of 2009, Smith repeated his request, and the city again refused to turn over the cell phone communications.¹⁵ Voicemails, emails, and text messages sent using city accounts were provided to Smith, but the city refused to disclose messages sent on private accounts on personal electronic devices.¹⁶

The crux of the question in *Smith* is: should government officials be able to shield communications regarding official city business from disclosure under the California Public Records Act by having these communications on their personal cell phones, tablets, and computers? However, an equally important question is: should government officials be forced to relinquish all privacy rights, even when communicating on personal accounts on their own privately owned electronic devices, because they have chosen to serve in public office? In essence, does the public's right to know outweigh the private citizen's right to privacy? When this question was initially answered by the Superior Court of Santa Clara County, the court held that the public's need to know trumped the privacy claim.¹⁷

⁹ Denis C. Theriault, *Mayor Unveils New Push for Downtown San Jose Redevelopment*, SAN JOSE MERCURY NEWS (Dec. 2, 2008, 3:41 PM), http://www.mercurynews.com/localnewsheadlines/ci_11123854.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Order After Hearing on March 15, 2013, *supra* note 8.

¹³ See Petition for Writ of Mandate and Request for Immediate Stay at 18–19, *City of San Jose v. Superior Court*, 169 Cal. Rptr. 3d 840 (Ct. App. 2014) (No. 1-09-CV-150427), available at <https://www.sanjoseca.gov/DocumentCenter/View/15674>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Order After Hearing on March 15, 2013, *supra* note 8.

The lower court in *Smith* followed the trend of a recent line of cases in California that have narrowed the right to privacy for public employees since the enactment of the California Public Records Act in 1968.¹⁸ The Act intended to create a broad public right of access to government records; however, the legislature also carefully crafted exceptions specifically designed to protect public employees' privacy.¹⁹ California courts have narrowed these exceptions over the past decade, increasingly favoring transparency through disclosure, but perhaps, in light of the appellate decision in *Smith* and another recent case²⁰ that seems to prioritize employee privacy, this trend has reached a halt.

On March 27, 2014, the Sixth District Court of Appeal issued its opinion reversing the lower court's finding in *Smith*.²¹ While the court based its decision on an issue of statutory construction of the definition of "public record," rather than on the policy concern of employee privacy, the effect is clear—private communications of public officials on personal electronic devices are not "public records" and are thus private.²² *Smith*'s attorney has stated that the City of San Jose and the California courts "haven't heard the last from us,"²³ and petitioned the Supreme Court of California for review of the appellate decision.²⁴ The supreme court granted the petition for review on June 25, 2014.²⁵ Whether the supreme court will uphold the appellate court's protection of employee privacy or will continue to mandate the expansion of transparency remains to be determined.

The court of appeal's decision, reversing the trial court in *Smith*, suggests there is more work to be done by the courts and legislature in defining the scope of the sunshine afforded to the public when access is sought to employee records. This Comment will examine the issue and discuss the stream of cases that have limited employee privacy rights over the last ten years. The tension between the public demand for government transparency and the desire to maintain individual privacy rights for the citizens who staff governmental bodies has reached a critical

¹⁸ California Public Records Act, CAL. GOV'T CODE §§ 6250–6270 (West 2014).

¹⁹ *Id.* § 6254.

²⁰ L.A. Unified Sch. Dist. v. Superior Court, 175 Cal. Rptr. 3d 90 (Ct. App. 2014).

²¹ City of San Jose v. Superior Court, 169 Cal. Rptr. 3d 840 (Ct. App. 2014).

²² *Id.* at 846–50.

²³ Mike Rosenberg, *San Jose Court: Government Workers Can Keep Messages from Personal Devices Private*, SAN JOSE MERCURY NEWS (Mar. 27, 2014, 4:29:47 PM), http://www.mercurynews.com/bay-area-news/ci_25435058/court-california-government-workers-can-keep-messages-from.

²⁴ City of San Jose v. Superior Court, 326 P.3d 976 (Cal. 2014).

²⁵ *Case Summary: City of San Jose v. Superior Court*, APP. CTS. CASE INFO., http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2075289&doc_no=S218066 (last updated May 22, 2015, 11:03 AM).

mass. While the public's demand to know has presented the more compelling case in California courts over recent years, we have begun to see the first signs that the balance may be shifting. This Comment speculates as to why the right to privacy, a right that has been demanded and defended since our colonial origins, has found fading significance when challenged by the public's concern for government oversight and argues that it is time to reprioritize privacy rights.

Part I explains the enactment of the California Public Records Act and the exemptions to disclosure that were created to protect privacy. Part II discusses the erosion of the exemptions to disclosure by a steady stream of cases in California courts and speculates as to why courts have increasingly favored disclosure. Part III proffers solutions to this problem and calls for intervention from the California legislature.

I. THE CALIFORNIA PUBLIC RECORDS ACT

A. The Enactment of the California Public Records Act

Abuses by government officials and inefficiencies in the government bureaucracy led to public outcries for government transparency. In an attempt to respond to the public's demand, the California State Legislature passed a number of pieces of legislation targeted at giving the public an opportunity to keep a watchful eye on its government officials. These acts of legislation, aimed at shining light on government processes and procedures, have been passed all over the country and are known as "sunshine laws."²⁶ Sunshine laws require governmental bodies to open meetings and records to public access.²⁷ In an effort to bring transparency to California, the state legislature enacted three open meeting acts²⁸ and the California Public Records Act.²⁹ The California Public Records Act ("CPRA") is the California state

²⁶ BLACK'S LAW DICTIONARY 1574 (9th ed. 2009).

²⁷ *Id.*

²⁸ California's open meeting acts include: the Ralph M. Brown Act, enacted in 1953, the Bagley-Keene Act, enacted in 1967, and the Grunsky-Burton Act, enacted in 1989. These companion open meeting acts were enacted in response to mounting concerns over public agencies holding informal, undisclosed meetings and secret study sessions in order to avoid public scrutiny. These acts guarantee the right of the public to attend and participate in meetings of governmental bodies and prohibit a majority of members of a governmental body or agency from communicating outside an official meeting to discuss any item of business within the subject matter jurisdiction of the body. *See* Ralph M. Brown Act, CAL. GOV'T CODE §§ 54950–54963 (West 2014); Bagley-Keene Open Meeting Act, CAL. GOV'T CODE §§ 11120–11132 (West 2014); Grunsky-Burton Open Meeting Act, CAL. GOV'T CODE §§ 9027–9031 (West 2014).

²⁹ California Public Records Act, CAL. GOV'T CODE §§ 6250–6270 (West 2014).

analog to the federal Freedom of Information Act (“FOIA”),³⁰ and was enacted in 1968³¹ “with the objective of increasing freedom of information,” and “[was] designed to give the public access to information in possession of public agencies.”³²

B. Exemptions to Disclosure Under the CPRA

The public’s right of access to information is not absolute under the CPRA.³³ The legislature delineated several exemptions that permit government agencies to refuse disclosure of certain public records.³⁴ There are two classes of exemptions to disclosure: (1) records expressly exempted under Government Code section 6254 and (2) a “catchall exemption” created by Government Code section 6255.³⁵ To a large extent, the exemptions reflect a strong desire on the part of the Legislature to protect privacy interests.³⁶

The exemption most closely aimed at protecting the privacy of public employees states that “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy” need not be turned over by government agencies.³⁷ In addition to the expressly provided exceptions under section 6254, several highly specific exemptions have been carved from the CPRA since its enactment, though none have been aimed at providing any further protection of the privacy of public employees.³⁸ The catchall exemption under section 6255 allows an agency to “justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record”;³⁹ however, the balancing of these interests has frequently tipped in favor of disclosure.

California courts have interpreted all of the exemptions narrowly⁴⁰ and have even encouraged turning over records in

³⁰ *Filarsky v. Superior Court*, 49 P.3d 194, 196 (Cal. 2002). The federal Freedom of Information Act was enacted in 1966 to require production of public records by federal agencies at the request of individual citizens. Freedom of Information Act, 5 U.S.C. § 552 (2012).

³¹ GOV’T §§ 6250–6270.

³² *L.A. Police Dep’t v. Superior Court*, 135 Cal. Rptr. 575, 579 (Ct. App. 1977).

³³ *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 293 (Cal. 2006).

³⁴ *Id.*

³⁵ GOV’T §§ 6254–6255.

³⁶ *Copley Press*, 141 P.3d at 293.

³⁷ GOV’T § 6254(c).

³⁸ *Id.* § 6254.

³⁹ *Id.* § 6255(a).

⁴⁰ *See Cnty. of L.A. v. Superior Court*, 149 Cal. Rptr. 3d 324, 325 (Ct. App. 2012);

cases where the records are statutorily exempt.⁴¹ Further, the CPRA places the burden of proving that an exemption applies on the agency opposing the disclosure.⁴² This is a heavy burden that is difficult for agencies to meet, and the stakes for attempting to fight disclosure are high, because the CPRA provides that the “court shall award court costs and reasonable attorney fees” to the record seeker, should he/she prevail in litigation filed as a result of refusal to disclose records.⁴³ The requirement that government agencies pay attorney fees in cases where disclosure is ultimately required after litigation increases the stakes for governmental bodies who choose to roll the dice in court. As a result of the heavy burden required to prevail in court and the high stakes imposed in the event the agency is not successful, government agencies are less likely to fight disclosure of records that threaten employee privacy for fear they will be stuck footing the bill after litigation.

II. THE EROSION OF PRIVACY RIGHTS OF CALIFORNIA PUBLIC EMPLOYEES UNDER THE CPRA

The last ten years have marked an era in the State of California that can be characterized as a time that has advanced the aim of increased government transparency. Perhaps the catalyst for this movement was the passage of California Proposition 59,⁴⁴ the “Sunshine Initiative.” Voters overwhelmingly voted in favor⁴⁵ of amending the California Constitution to include a requirement that “the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”⁴⁶ While this amendment does not directly require any information to be made available to the public, it builds off the existing transparency laws, such as the CPRA and the state’s open meeting laws, and explicitly recognizes the public’s concern for the conduct of public business.⁴⁷ The effect, with respect to record disclosure, is to

Sierra Club v. Superior Court, 302 P.3d 1026, 1032 (2013).

⁴¹ ACLU of N. Cal. v. Superior Court, 134 Cal. Rptr. 3d 472, 496 n.17 (Ct. App. 2011).

⁴² Cnty. of Santa Clara v. Superior Court, 89 Cal. Rptr. 3d 374, 388 (Ct. App. 2009).

⁴³ GOV’T § 6259(d).

⁴⁴ California General Election, November 2, 2004, State Ballot Measures, CAL. SECRETARY OF ST. KEVIN SHELLEY, <http://vote2004.sos.ca.gov>Returns/prop/00.htm> (last updated Dec. 7, 2004).

⁴⁵ 83.4% of votes were cast in favor of passing Proposition 59 in the November 2, 2004 election. *Id.*

⁴⁶ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 81 (2004), available at <http://voterguide.sos.ca.gov/past/2004/general/propositions/prop59text.pdf>.

⁴⁷ *Proposition 59*, LEGIS. ANALYST’S OFF. (July 2004), http://www.lao.ca.gov/ballot/2004/59_11_2004.htm.

require the government entity “to demonstrate to a somewhat greater extent . . . why information requested by the public should be kept private.”⁴⁸

In addition to overwhelming voter support, Proposition 59 was unanimously approved for the ballot by the California State Assembly.⁴⁹ Perhaps interpreting the broad support from both the legislature and California voters as a mandate for increased transparency, California courts, beginning with a decision concurrent with the movement for the “Sunshine Amendment,” have expanded the scope of disclosure required under the CPRA. The *Smith* decision is the first sign that this trend of expansion has perhaps reached its outer bounds.

A. The Steady Stream of Cases in California that Have Favored Disclosure

1. Complaints About Public Employees

California courts began chipping away at the exemptions to protect public employee privacy with the decision to require disclosure of disciplinary records of public employees in *Bakersfield City School District v. Superior Court of Kern County*.⁵⁰ In *Bakersfield*, the *Bakersfield Californian*, a daily newspaper and online news source serving the Kern County area, petitioned for writ of mandate for access to disciplinary records of Vincent Brothers, an employee of Bakersfield City School District.⁵¹ Complaints had been filed against Brothers regarding an incident of “sexual type conduct, threats of violence and violence” that allegedly occurred on February 20, 1996.⁵² Bakersfield City School District (“District”) attempted to invoke an exemption from disclosure—Government Code section 6254(c), which exempts personnel records which would constitute an unwarranted invasion of privacy from disclosure.⁵³ Earlier courts had clarified the details of this exemption stating, this “personnel exemption” was “developed to protect intimate details of personal and family life, not business judgments and relationships”⁵⁴ and

⁴⁸ *Id.*

⁴⁹ Prior to being placed on the November 2, 2004 ballot, the California State Assembly voted 78-0 in favor to approve the proposition for the ballot, and the California State Senate voted 34-0 in favor to approve. Cal. Attorney Gen., *Official Title and Summary*, OFFICIAL VOTER INFO. GUIDE (Nov. 2004), <http://vote2004.sos.ca.gov/voter/guide/propositions/prop59-title.htm>.

⁵⁰ *Bakersfield City Sch. Dist. v. Superior Court*, 13 Cal. Rptr. 3d 517 (Ct. App. 2004).

⁵¹ *Id.* at 518.

⁵² *Id.* at 519.

⁵³ *Id.* at 520.

⁵⁴ *Braun v. City of Taft*, 201 Cal. Rptr. 654, 660 (Ct. App. 1984).

setting forth the legal standard to be followed when weighing individual privacy rights against the public's right to know.⁵⁵ However, the *Bakersfield* case is notable for refining that standard for weighing the interests to tip in favor of disclosure.

Prior to *Bakersfield*, disclosure of complaints was not exempted under section 6254(c) when the complaints of a public employee's wrongdoing and resulting disciplinary investigation revealed allegations of a substantial nature, as distinct from baseless or trivial, and reasonable cause existed to believe the complaint was well founded.⁵⁶ In *Bakersfield*, the lower court found that the complaint was substantial in nature and there was reasonable cause to believe the complaint was well founded, and as such, required disclosure; however, the court was careful to note that it made no findings as to the truth of the allegations in the complaint.⁵⁷ The District challenged the lower court's ruling, asserting that a complaint could only be well-founded if there was reasonable cause to believe the complaint of misconduct was true or if discipline had been imposed.⁵⁸ The District relied on cases interpreting section 6254(c) that had placed weight on the fact that the complaints were found true or discipline was imposed on the employee to support the finding of strong public policy in favor of disclosure.⁵⁹ The *Bakersfield* court considered this issue and held that while a finding of truth to the complaints or disciplinary action being imposed on the employee strongly favored requiring disclosure, neither was a prerequisite to finding that the complaint was of a substantial nature and was well-founded.⁶⁰

After *Bakersfield*, and going forward, all that would be required in order to require disclosure of disciplinary complaints in an employee's personnel records would be "sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded."⁶¹ This lowering of the standard required to merit disclosure was a first step taken by the court in favor of promoting the interest of the public's right to know at the expense of the employee's right to privacy. By requiring

⁵⁵ *Am. Fed'n of State, Cnty. & Mun. Emps., Local 1650 v. Regents of the Univ. of Cal.*, 146 Cal. Rptr. 42, 44–45 (Ct. App. 1978).

⁵⁶ *Id.*

⁵⁷ *Bakersfield*, 13 Cal. Rptr. 3d at 519.

⁵⁸ *Id.*

⁵⁹ *City of Hemet v. Superior Court*, 44 Cal. Rptr. 2d 532, 543 (Ct. App. 1995); *Am. Fed'n*, 146 Cal. Rptr. at 44–45; *Chronicle Publ'g Co. v. Superior Court*, 354 P.2d 637, 646 (Cal. 1960). Courts have applied the rule in *Chronicle* that complaints made to the state bar regarding professional conduct of attorneys are confidential unless they result in disciplinary action, to requests made under the CPRA for personnel records. *Id.* 2d at 646.

⁶⁰ *Bakersfield*, 13 Cal. Rptr. 3d at 521.

⁶¹ *Id.*

disclosure of disciplinary complaints that are not verified to be truthful or substantiated by employee discipline, the court signaled that the CPRA's strong policy in favor of disclosure would be upheld and the courts would construe exceptions narrowly.

2. Employee Investigative Reports

In September of 2006, the court took yet another step toward narrowing the scope of employee privacy in the State of California in the decision of *BRV, Inc. v. Superior Court of Siskiyou County*.⁶² In *BRV*, the petitioner, publisher of the *Redding Record Searchlight* newspaper, filed suit to obtain access to an investigative report regarding Robert Morris, the superintendent of Dunsmuir Joint Union High School District ("District") and principal of Dunsmuir High School.⁶³ The report was prepared by a private investigator who was commissioned by the District to investigate after complaints were received that Morris had "verbally abused students in disciplinary settings and sexually harassed female students."⁶⁴ After the report was prepared, Morris and the District's board of trustees negotiated an agreement where Morris would resign from his positions, receive over five months of paid administrative leave, and then would have his retirement kick in.⁶⁵ The District agreed to confidentiality of Morris' personnel file and all documents relating to the investigation; but naturally, the public was interested in the resolution of the matter.⁶⁶

BRV filed a petition for writ of mandate against the District to compel disclosure under the Public Records Act of the investigative report and all documents related to Morris' resignation.⁶⁷ The District refused to turn over the investigative report, invoking the personnel records exemption, or in the alternative, the catchall exemption.⁶⁸ The trial court determined that most of the report was in fact exempt from disclosure under the personnel records exemption, even though it tended to exonerate Morris from the charges.⁶⁹ The court noted this was "an odd result, but felt constrained by case law not to disclose

⁶² *BRV, Inc. v. Superior Court* 49 Cal. Rptr. 3d 519 (Ct. App. 2006).

⁶³ *Id.* at 522.

⁶⁴ *Id.* at 521.

⁶⁵ *Id.* at 522.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 522-23.

complaints that were determined not to be credible or to concern serious matters.”⁷⁰

Upon review by the Third District Court of Appeal, the court reversed, finding “the public’s interest in understanding why Morris was exonerated and how the District treated the accusations outweighs Morris’ interest in keeping the allegations confidential.”⁷¹ The court reviewed the previous case law the lower court had determined it was bound by, and chose to disregard those restraints. The opinion reasoned that because of Morris’ status as a high-ranking public official, he was entitled to a lesser standard of privacy protection.⁷² The court stated, “Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public’s business strips him of some anonymity.”⁷³ As such, the court found this case was distinguishable from the precedent cases because unlike the public officials in previous cases, Morris “had a significantly reduced expectation of privacy in the matters of his public employment.”⁷⁴ The court applied a balancing test comparing Morris’ interest in maintaining his privacy to the public’s interest in disclosure and found that, while Morris did have a substantial interest in maintaining confidentiality of the report, the public’s interest in understanding why Morris was exonerated and how the District treated the accusations of misconduct outweighed the interest of keeping the allegations confidential.⁷⁵

This case, like *Bakersfield*, relaxed the standard under which personnel records can be disclosed under the CPRA. *BRV* went further than *Bakersfield* and carved out a flexible standard that can be applied to high ranking public officials that allows disclosure without regard to the reliability of the complaints lodged against the employee. *Bakersfield* and *BRV* opened the door to future decisions in California that have further narrowed the scope of employee privacy and expanded public access to personnel records.

3. Pay Data and Salary Information

The California Supreme Court took the next step in shrinking the protection for public employee privacy in its 2007 decision, *International Federation of Professional and Technical*

⁷⁰ *Id.* at 523.

⁷¹ *Id.* at 530.

⁷² *Id.*

⁷³ *Id.* at 529.

⁷⁴ *Id.* at 530.

⁷⁵ *Id.* at 528–30.

Engineers, Local 21 v. Superior Court of Alameda County.⁷⁶ In *International Federation*, Contra Costa Newspapers brought suit to compel disclosure by the City of Oakland of the names, job titles, and gross salaries of all city employees who earned more than \$100,000 in the fiscal year of 2003–2004.⁷⁷ The city agreed to disclose salary and overtime information for each job classification, but refused to give salary specifics that were linked to individual employees⁷⁸ and cited the personnel records exemption to the CPRA as grounds for its refusal.⁷⁹ While Oakland had previously disclosed this type of information to media outlets, it refused in 2004, citing three factors: (1) two appellate decisions that recognized a right to privacy in public employee salary information;⁸⁰ (2) increased concerns for financial privacy; and (3) strong opposition from two unions who represented the city employees whose financial information was sought.⁸¹

Both the superior court and the court of appeal found that, assuming a privacy interest existed, that interest was outweighed by the public's interest in disclosure and, as such, required disclosure.⁸² On appeal to the supreme court, all parties agreed that "individuals have a legally recognized privacy interest in their personal financial information,"⁸³ and the court agreed that individuals may be uncomfortable or even embarrassed with others knowing their salary information; however, the court found the strong public policy supporting transparency in government outweighed any expectation of privacy.⁸⁴ The court placed weight on the fact that requiring disclosure of pay data and public employee names was "overwhelmingly the norm" when surveying the practices of other federal, state, and local governments.⁸⁵ The court further opined that without a significant fear that the salary information disclosed was likely to be exploited or misused by the public at large, the interest in maintaining privacy could not outweigh the high interest in favor of giving the public an opportunity to monitor corruption, incompetence, inefficiency, nepotism, and

⁷⁶ Int'l Fed'n of Prof'l & Technical Eng'rs, *Local 21 v. Superior Court*, 165 P.3d. 488 (Cal. 2007).

⁷⁷ *Id.* at 491.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 491–92.

⁸¹ *Id.* at 492.

⁸² *See id.*

⁸³ *Id.* at 493.

⁸⁴ *Id.* at 494.

⁸⁵ *Id.* at 494–95.

financial mismanagement through knowledge of how the government spends its money.⁸⁶

While this case only discussed disclosure of employee salaries in positions that paid over \$100,000 per year, either from base salary alone or from overtime pay in addition to base salary, the court's rationale could be applied to require disclosure of pay data from any public employee.⁸⁷

Since the 2007 *International Federation* decision, the demand for transparency of government salaries for public employees has remained high, especially in light of events like the salary scandal in the City of Bell.⁸⁸ In October of 2010, State Controller John Chiang launched a website that allows users to search for salary, pension benefits, and other compensation information for more than 2 million public employees in the State of California.⁸⁹ At this time, the database does not include individual employee names, with the exception of certain top, highly-paid officials;⁹⁰ however, the road for such widespread disclosure with virtually unlimited access would not be outside the scope allowable in light of the decision in *International Federation*.⁹¹

⁸⁶ *Id.* at 494–99.

⁸⁷ LEAGUE OF CAL. CITIES, THE PEOPLE'S BUSINESS: A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT 30 (2008), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/62/62f84af4-13c5-4667-8a29-261907aea6d6.pdf>.

⁸⁸ See *Timeline Bell: 'Corruption on Steroids,'* *supra* note 3.

⁸⁹ Patrick McGreevy, *State Releases New Local-Government Salary Database*, L.A. TIMES BLOG (Oct. 25, 2010, 1:10 PM), <http://latimesblogs.latimes.com/california-politics/2010/10/state-releases-new-local-government-salary-database.html>; see also *Government Compensation in California*, CAL. ST. CONTROLLER'S OFF., <http://public.pay.ca.gov> (last visited Apr. 19, 2015).

⁹⁰ *Government Compensation in California*, *supra* note 89.

⁹¹ Another interesting facet of the *International Federation* decision was that the court chose to extend the requirement of disclosure of salary information to peace officers as well. *Int'l Fed'n*, 165 P.3d at 505. In addition to the exemptions to the CPRA that protect all public employees' privacy, peace officers are afforded additional special protections. See CAL. PENAL CODE §§ 832.7–832.8 (West 2014); Public Safety Officers Procedural Bill of Rights, CAL. GOV'T CODE §§ 3300–3313 (West 2014). One of the unions who intervened to defend the privacy of the public employees in *International Federation* was the Oakland Police Officers Association. *Int'l Fed'n*, 165 P.3d at 492. The Police Officers Association claimed that Penal Code section 832.7 barred disclosure of the salary information, and as such, the peace officers' salary information should not be disclosed, because the CPRA exempts records that are prohibited from disclosure under other federal or state laws. *Id.* at 501. The court found the language in Penal Code sections 832.7 and 832.8 did not require withholding the records from disclosure and rejected the notion "that peace officers in general have a greater privacy interest in the amount of their salaries than that possessed by other public employees . . ." *Id.* at 503. However, the court did note that special circumstances, like large amounts of overtime pay that correlated with undercover work, that might place the officer's safety at risk may create a sufficient privacy interest to outweigh the need for disclosure. *Id.* The court did not find this circumstance adequate to render all peace officer salary records confidential. *Id.* In part owing to the additional protections for peace officers imposed by statute, and in part due to the public policy interests within the State of California that have favored creating

4. Retirement Benefits and Pension Data

The next step in the steady increase of government transparency at the expense of public employee privacy came in 2011 with the decision of *Sacramento County Employees' Retirement System v. Superior Court of Sacramento County*.⁹² After much public outcry over government pensions, the *Sacramento Bee* petitioned to compel disclosure of pension benefits and named retirees from the Sacramento County Employees' Retirement System ("SCERS").⁹³ In order to avoid disclosure, SCERS asserted exemption on the grounds that the records were exempted or prohibited from disclosure under federal or state law, here a confidentiality rule of the County Employees Retirement Law of 1937, codified in Government Code section 31532.⁹⁴ In the alternative, SCERS argued for exemption from disclosure under the catchall exemption, stating that the public interest in nondisclosure clearly outweighed the public interest in disclosure.⁹⁵ SCERS raised four key points that weighed in favor of nondisclosure: (1) the right to financial privacy; (2) the risk of public criticism; (3) the risk of financial abuse, particularly to vulnerable senior citizens; and (4) the alternative methods of collecting pension information that were available to the newspaper seeking disclosure.⁹⁶ The court did not find these arguments compelling, and although SCERS identified some legitimate interests in nondisclosure, they fell short of demonstrating that the public interest in disclosure was clearly outweighed.⁹⁷

The court in *Sacramento* echoed the holding in *International Federation*.⁹⁸ Because pensions are simply deferred public compensation,⁹⁹ the court's rationale in *International Federation* was easily extended to support the narrowing of privacy rights for public retirees right along with public employees.

additional safeguards for peace officer privacy, peace officers have enjoyed greater privacy protection over the years than other public employees. This case marks a shift in this area. As privacy rights for public employees narrow, the courts have also begun to narrow the protection for peace officers.

⁹² *Sacramento Cty. Emps.' Ret. Sys. v. Superior Court*, 125 Cal. Rptr. 3d 655 (Ct. App. 2011).

⁹³ *Id.* at 659.

⁹⁴ *Id.* at 665.

⁹⁵ *Id.* at 675.

⁹⁶ *Id.*

⁹⁷ *Id.* at 679.

⁹⁸ *Id.* at 680.

⁹⁹ *Id.* at 677.

5. Personnel Disciplinary Documents

The next case that is critical to a full understanding of the narrowing of the privacy rights of California public employees is *Marken v. Santa Monica-Malibu Unified School District*.¹⁰⁰ Ari Marken, a math teacher at Santa Monica High School, was investigated and reprimanded for sexually harassing students.¹⁰¹ After Marken returned to the classroom, a parent, Michael Chwe, requested disclosure of the Santa Monica-Malibu Unified School District's ("District") records regarding the investigation of Marken under the CPRA.¹⁰² Marken was informed by the District that it intended to release the investigation report and the letter of reprimand.¹⁰³ Marken filed a complaint for injunctive and declarative relief alleging that the disclosure of the records, his personnel records, was not authorized under the CPRA and would violate his constitutionally and statutorily protected privacy rights.¹⁰⁴

Marken asserted exemption on the grounds that the report and letter were personnel records under Government Code section 6254(c).¹⁰⁵ As such, Marken's interest in protecting his privacy was subject to balancing against the public's interest in disclosure of the records.¹⁰⁶ The court found the public's interest in knowing how the District investigates and disciplines employees for sexual harassment substantially outweighed Marken's privacy interest,¹⁰⁷ and relying on the precedent cases of *International Federation*,¹⁰⁸ *Chronicle*,¹⁰⁹ *Bakersfield*,¹¹⁰ and

¹⁰⁰ *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 136 Cal. Rptr. 3d 395 (Ct. App. 2012).

¹⁰¹ *Id.* at 399.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* This was the first time a California court had allowed an action brought by the party whose records were being sought—a "reverse CPRA" action. While these actions had previously been allowed under the federal Freedom of Information Act, the *Marken* court was the first to decide this issue of first impression in California appellate courts. The court held that a public employee could in fact institute a reverse CPRA action because: (1) a reverse-CPRA action seeks judicial review of an agency decision under the CPRA instead of asking the court to undertake the decision making in the first place; and (2) no comparable procedure exists for a public employee to obtain a judicial ruling precluding a public agency from improperly disclosing confidential documents. *Id.* at 408–09. This case is notable for creating this new right for public employees seeking to protect their own private records. However, it is important to note that in the event that employees do bring suit to defend their privacy interests in a reverse-CPRA action and are not victorious in court, the employee is not awarded attorney's fees as a typical petitioner in a CPRA action would be. *Id.* at 410. This creates a substantial risk for employees who decide to bring this type of claim.

¹⁰⁵ *Id.* at 415.

¹⁰⁶ *Id.* at 416–17.

¹⁰⁷ *Id.*

¹⁰⁸ *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Superior Court*, 165 P.3d 488 (Cal. 2007).

BRV,¹¹¹ the court held that although Marken was not a “high profile” public official, the investigative report and letter of reprimand must be disclosed because the complaint was determined to be well-founded and substantial discipline had been imposed.¹¹²

The court in *Marken* ultimately concluded that the records sought by Chwe were not exempt from disclosure under the CPRA¹¹³ and added yet another class of documents, disciplinary documents, to the group of highly sensitive personnel records that must be disclosed under the CPRA.

B. An End in Sight?

Perhaps an end to the expansion of required disclosures under the CPRA by California courts is in sight. In light of two recent decisions, it appears we may be finally starting to see the courts pull back on the reins and implement some protections for employee privacy.

1. Communications on Personal and Private Electronic Devices

As discussed above, *Smith v. City of San Jose* addresses one of the most contentious examples of the potential for abuse of privacy under the CPRA that has been reviewed by California courts.¹¹⁴ In *Smith*, the lower court held that communications, specifically voicemails and text messages, between city officials that were sent on private electronic devices using personal messaging accounts must be disclosed under the CPRA.¹¹⁵ The City of San Jose raised several arguments in favor of exemption from disclosure regarding the statutory definitions of “public record” and “public entity” under the CPRA.¹¹⁶ The court did not find these arguments convincing and ultimately cast aside the city’s concern that such a broad reading of the CPRA that included communications of private electronic devices using personal accounts would be inconsistent with the CPRA’s aim to provide for the protection of the privacy of individual employees.¹¹⁷ Opining that it was unlikely that city officials would have a reasonable expectation of privacy over

¹⁰⁹ *Chronicle Publ’g Co. v. Superior Court*, 354 P.2d 637 (Cal. 1960).

¹¹⁰ *Bakersfield City Sch. Dist. v. Superior Court*, 13 Cal. Rptr. 3d 517 (Ct. App. 2004).

¹¹¹ *BRV, Inc. v. Superior Court*, 49 Cal. Rptr. 3d 519 (Ct. App. 2006).

¹¹² *Marken*, 136 Cal. Rptr. 3d at 416–17.

¹¹³ *Id.*

¹¹⁴ Order After Hearing on March 15, 2013, *supra* note 8.

¹¹⁵ *Id.* at 7, Exhibit A.

¹¹⁶ *Id.* at 5–6, Exhibit A.

¹¹⁷ *Id.* at 6–7, Exhibit A.

communications concerning public matters and dismissing the argument that producing such communications would be unduly burdensome for public entities, the court required disclosure of the communications.¹¹⁸

On March 27, 2014, the California Court of Appeal issued its opinion reversing the lower court's finding in *Smith*.¹¹⁹ The court held that the writings of city officials and employees sent or received through private and personal accounts on private electronic devices are not "public records" under the CPRA and are thus, private and not subject to disclosure.¹²⁰ This case is presently being briefed for review by the California Supreme Court.¹²¹ As such, the true impact of *Smith* remains to be determined. Will this case mark an end to the era of the narrowing of public employee privacy by California courts, or will the California Supreme Court reverse and allow the trend heavily favoring government transparency at the cost of privacy to continue?

2. Teacher Evaluations

A victory for the protection of public employee privacy came in July of 2014, with the decision of *Los Angeles Unified School District v. Superior Court of Los Angeles County*¹²² ("LAUSD"). In *LAUSD*, the *Los Angeles Times* sought disclosure of records used to measure teacher effectiveness from the Los Angeles Unified School District ("District"). After receiving the public records request, the District turned over the documents but chose to withhold the teachers' names, citing the personnel records and catchall exemptions to the CPRA.¹²³ The lower court ruled that the burden was not met to merit either exemption and required disclosure of the teachers' names with the corresponding scores for effectiveness.¹²⁴

On appeal to the Second District Court of Appeal, the court first considered the applicability of the catchall exemption.¹²⁵ The exemption requires the balancing of the public interest in disclosure against the public interest in nondisclosure. In order to make its determination, the court engaged in a lengthy

¹¹⁸ *Id.*

¹¹⁹ *City of San Jose v. Superior Court*, 169 Cal. Rptr. 3d 840 (Ct. App. 2014).

¹²⁰ *Id.* at 842.

¹²¹ *Appellate Courts Case Information*, CAL. CTS, http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2075289&doc_no=S218066 (last updated Apr. 28, 2015).

¹²² *L.A. Unified Sch. Dist. v. Superior Court*, 175 Cal. Rptr. 3d 90 (Ct. App. 2014).

¹²³ *Id.* at 96–97.

¹²⁴ *Id.* at 98–99.

¹²⁵ *Id.* at 104–05.

discussion as to how “public interest” is defined, concluding that “the public interest which must be weighed is the interest in whether such disclosure ‘would contribute significantly to public understanding of government activities’ and serve the legislative purpose of ‘shed[ding] light on an agency’s performance of its statutory duties.’”¹²⁶

The court then went on to determine the weight that should be given to the public interest in the case.¹²⁷ The court determined that in order for the public interest to carry weight, it must be more than hypothetical or minimal and must reveal something directly about the character of a government agency or official. Further, the court concluded that the motives of the individual seeking the records is irrelevant. The question is whether the disclosure serves a public purpose, not the private interest of the requesting party.¹²⁸

In making its decision with respect to the catchall exemption of Government Code section 6255, the court employed a three-part test: (1) whether there is a public interest served by nondisclosure of the records; (2) whether a public interest is served by disclosure of the records; and (3) if both are found, whether (1) clearly outweighs (2); if it does not, the records shall be disclosed.¹²⁹ In applying the test, the court determined that the public interest in nondisclosure clearly outweighed the public interest in disclosure.¹³⁰ The court cited the high public interest served by nondisclosure in preventing intervention with the District’s ability to function well and the minimal public interest in disclosure created by the fact that disclosure more likely furthered the private interest of parents hoping to further their children’s success in school.¹³¹

In light of the court’s decision that the catchall exemption justified withholding disclosure in this case, the court declined to discuss whether the personnel records exemption would also apply.¹³² However, the court did consider and determine that while the effectiveness scores were not strictly personnel records, in following California precedent that has broadly construed the language, “personnel, medical, or *other similar files*” in Government Code section 6254(c), the scores would be the type of information that would be covered, and as such, subject to the

¹²⁶ *Id.* at 102–03.

¹²⁷ *Id.* at 104.

¹²⁸ *Id.*

¹²⁹ *Id.* at 105.

¹³⁰ *Id.* at 113.

¹³¹ *Id.* at 107–11.

¹³² *Id.* at 114.

balancing of the public's interest in disclosure against the privacy right the exemption is designed to protect.¹³³

This *LAUSD* decision can be seen as a victory for public employee privacy in that it placed one class of information—teacher effectiveness scores—within a protected status. In a larger sense, the decision clarified that a private interest in disclosure, such as that of the parents in the case, was not sufficient to constitute, and could not be conflated with, a public interest in disclosure for the purposes of the catchall exemption. Perhaps this case, when taken together with the court's holding in *Smith*, signifies that we may be reaching an end to the era of expanding disclosure.

C. The Disconnect Between the Language and Intent of the CPRA and Its Reality

At this point, it is unclear what type of personnel data a public entity could refuse to disclose under the CPRA. The exemption to disclosure under Government Code section 6254(c) plainly states nothing in this chapter shall be construed to require disclosure of records that are “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”¹³⁴ Upon a reading of that plain language, it is likely that an employee would not anticipate the broad scope of records that must be disclosed according to the case law in California. An employee is likely to think that all of the categories of documents discussed above, like salary information, retirement benefits, investigative reports, complaints regarding employee conduct, and disciplinary documents would all be considered personnel records, and would thus be exempt. Further, an employee is likely to think the information contained in those records is of a sensitive and private nature. It is argued in this Comment, that this disconnect between what the exemption to disclosure plainly states and what is actually required through the courts' construction of that language is problematic.

Integral to an understanding of privacy rights is whether a person has a reasonable expectation of privacy given the circumstances.¹³⁵ Here, the expectation of privacy created by the statutory language of the CPRA does not align with the reality of the scope of privacy protection for California public employees. Without engaging in an active study of the current California

¹³³ *Id.* at 101–02 (emphasis added).

¹³⁴ California Public Records Act, CAL. GOV'T CODE § 6245(c) (West 2014).

¹³⁵ *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967).

case law, it is unlikely that an employee would be able to anticipate the limited scope of his or her own privacy rights.

Further exacerbating this problem is the fact that the legislative intent of the CPRA indicates a desire to achieve balance between the competing interests of the public's right of access to information concerning the conduct of the people's business and of the individual's right of privacy.¹³⁶ The intent of the Act plainly indicates it will balance these competing interests. While courts have certainly gone through the act of weighing the interest in protecting employee privacy against the public's desire for transparency, it could be argued that this weighing has been rather perfunctory and the interest in privacy has not been given as much weight as perhaps the Act would suggest it should be given. Public employees may be falsely misled by the stated intent of the Act to believe that their privacy interests may be given more weight than courts have in fact afforded.

Also problematic here is the potential that qualified individuals will be deterred from public service once they do realize the limitations on their privacy rights and the broad scope of the records for which disclosure is required in the State of California. With involvement in the public sector comes certain sacrifices. Elected officials are likely to be more keenly aware of both the benefits of public service and of the sacrifices that come with subjecting oneself to public scrutiny. However, government employees may be less aware of the potential consequences. Attracting dedicated and hardworking individuals to the public sector is necessary to ensure optimal functionality of government entities. In order to do so, the sacrifices of government service must not outweigh the benefits. It is possible that if this trend of dismissing the privacy interests of public employees continues in California courts, employees may find the public sector less alluring and alternatively seek employment in the private sector.

D. Potential Reasons for Decreased Privacy Protections for Public Employees

It may seem curious that despite the plain language of the CPRA and the stated intent of the legislature to balance the public desire for transparency against the need to protect employee privacy, courts have continually favored disclosure at the expense of privacy protection. The most logical explanation appears to be that California courts have interpreted the public's

¹³⁶ LEAGUE OF CAL. CITIES, *supra* note 87, at 3.

call for transparency to be a weighty factor that is not easily cast aside. In the wake of controversies at the national level and on the smaller state and local levels that have demonstrated the immense potential for government corruption when officials are left unchecked by public scrutiny, the public has increasingly called for transparency.

Interestingly enough, at the same time citizens have called for increased public scrutiny of government officials, the whole world has become increasingly less concerned with scrutiny of their own actions. The advent of the Internet, blogging, and social networking sites like Facebook, Twitter, Tumblr, Instagram, etc., forever changed our notions of privacy. It has become a source of entertainment in society for individuals to continuously post and update their locations, activities, likes and dislikes, friends, photographs, and happenings in their lives. The details of people's lives and chronicles of their thoughts and ideas are catalogued on social media, and once things are posted online, they are there to stay, indefinitely. However, society is undeterred and continues posting and updating and sharing. It is hard to imagine that in this era of over-sharing privacy could be a concern for anyone.

Perhaps courts have decided that because individuals are increasingly willing to surrender their own rights to privacy for the sake of social media, it is less a matter of public concern that privacy rights be protected. The increased weight given to the public's desire for the opportunity to shine a light on the darkness of government corruption and the relatively decreased weight placed on protecting privacy interests has tipped the scales in favor of disclosure. It appears that California courts are looking less at the plain language of the CPRA and more at the competing desires that are implicated by their decisions of whether or not to mandate disclosure. This Comment speculates that this seems to be the most likely explanation for the narrowing of privacy rights of public employees that has occurred under the CPRA.

III. PROPOSAL

I am not the first to see the disconnect between the protection that appears to be established by the statutory language of the CPRA and the reality established by courts. In his article, the *Fading Privacy Rights of Public Employees*, Dieter Dammeier interpreted the federal FOIA's nearly identical exemption for personnel records¹³⁷ and concluded that "[a]

¹³⁷ Section 552(b)(6) of the Freedom of Information Act exempts "personnel and

reasonable public employee would read the text of this statute and conclude that it protects disclosure of his personal information to the public.”¹³⁸ Dammeier also noted the tendency of courts interpreting FOIA to err on the side of disclosure and place a heavy burden on government agencies that invoke the invasion of privacy exception.¹³⁹ Dammeier and I both speculate that the reduction in employee privacy is most likely connected with the “recent push for government accountability.”¹⁴⁰ We also both agree that courts have likely gone too far and assert that obtaining such government accountability “should not require the disclosure of private personnel records, such as the pay records of individual employees.”¹⁴¹

Dammeier’s discussion of the courts’ interpretations of FOIA’s exemption for private personnel records is grounded in his larger discussion of fading privacy rights of public employees in areas far beyond record disclosure. His work is largely concerned with noting that no segment of society has witnessed constitutional privacy protections disappear more rapidly than public employees, and his discussion spans numerous instances that support this proposition, including, being subjected to warrantless searches at work, increased use of drug testing, and the use of audio and video monitoring of employees.¹⁴² Dammeier concludes that public employees have a diminished expectation of privacy as a result of their chosen profession, but also have little certainty as to what expectation of privacy they enjoy.¹⁴³ He faults courts for that lack of certainty and asserts that courts have failed to establish a reasonable and workable standard with which to review public employee privacy cases.¹⁴⁴

While Dammeier’s conclusion may hold true for cases evaluating FOIA’s requirements for disclosure,¹⁴⁵ I do not find the same applies in California. I have examined the trend of narrowing privacy rights of public employees, specifically allowed under the CPRA, a study I find no similar scholarship on, and

medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” from disclosure. Freedom of Information Act, 5 U.S.C. § 552(b)(6) (2012).

¹³⁸ Dieter C. Dammeier, *Fading Privacy Rights of Public Employees*, 6 HARV. L. & POL’Y REV. 297, 305–06 (2012).

¹³⁹ *Id.* at 306.

¹⁴⁰ *Id.* at 307.

¹⁴¹ *Id.*

¹⁴² *Id.* at 297.

¹⁴³ *Id.* at 312.

¹⁴⁴ *Id.*

¹⁴⁵ I have made no investigation into cases involving employee privacy under FOIA, and as such, do not attempt to evaluate the accuracy of any of Mr. Dammeier’s conclusions.

arrived at the conclusion that California courts have not provided an unworkable standard for review of employee privacy cases. The standard in California requires balancing of the employee's privacy interest against the public's interest in disclosure of the information. This standard is workable and has been effectively utilized in courts. However, the problem I see is that the cases that have made it into courtrooms in California have been disproportionately representative of cases with high potential for privacy infringement and unusually high public interest in disclosure.

Of the precedential cases discussed above, three of the seven involve instances of employees charged with misconduct of a sexual nature, two involve the use of public funds for employee compensation, one involves communications on private electronic devices, and one involves individualized teacher effectiveness scores. It is easy to see why public entities, or the employees themselves, have sought to protect the privacy of the parties involved in these cases. However, it is also easy to see why the public would accept the risks of litigation in these matters and push for disclosure. The public interest in overseeing the use of public funds and in ensuring employees, especially public educators, are performing effectively and are disciplined for sexual misconduct is very high. In these situations, with unusually strong interests on both sides of the balancing equation, the courts (especially the trial courts) have favored disclosure. This has had the effect of setting precedent that these types of records—complaints, investigative reports, and disciplinary records about employees, salary and pension information, and even potentially personal electronic communications—must be turned over, even when the threat to employee privacy is high. Because the facts were so egregious in these cases, courts have strayed further and further away from the plain language of the act, which exempts personnel data, and other documents that are of a highly private nature to public employees, from disclosure.

Owing to the provision of the CPRA that awards attorney fees to record-seekers who successfully challenge public entities who refuse to disclose with litigation, public agencies must be wary of which requests for disclosure they oppose. There is a risk that these precedential cases will deter agencies from opposing record requests in similar, but less egregious circumstances, for fear of getting stuck paying the bill if they are unsuccessful in court. Further, the risk of the even greater imposition of fees for appellate costs may deter public entities from appealing trial court decisions that initially required disclosure such as *Smith*

and *LAUSD*. Had the information in those cases, electronic communications on private devices and teacher evaluation data, not been of such a highly sensitive nature, these cases may never have been appealed. This opens the door to the possibility that other cases involving less clearly controversial subject matters, but perhaps also privacy rights no less worthy of protection, may go unchallenged.

I hope to go beyond mere identification and discussion of the issues and problems associated with the decrease in privacy for public employees and propose some solutions that may help to alleviate the tension in this area in the future.

A. The Intent of the CPRA Must Be Clarified

If we have reached a point where the interest in public transparency has taken precedence over the desire to protect the privacy rights of public employees, as has been speculated, the plain language of the CPRA must be amended to reflect this shift in purpose and intent. If the process of legislative interpretation has shifted the balance of the CPRA such that the original aim of protecting employee privacy has given way to a larger aim of helping citizens obtain information that will allow them to serve as government watchdogs and provide oversight to curb government corruption, this should be plainly stated in the Act. It is disadvantageous to create an anticipation of privacy for public employees in the Act that is not a reality under the case law. We must also provide transparency for public employees regarding the scope of their privacy rights. If citizens choose employment in the public sector, they should do so with all the information as to the limitations on their privacy rights.

I recommend an amendment to the CPRA to clarify the intent of the Act and to specify the types of personnel records that have specifically been determined not to be exempt from disclosure. In the event that the legislature did not intend to require disclosure of the documents that California courts have determined should be disclosed, the CPRA should be amended to resolve what personnel records specifically should be exempt and which should not.

B. Protections Should Be Put in Place for Public Employees

If it still a desire of the public to protect privacy rights of public employees, and especially if there are concerns that the lack of privacy protections in place for public employees will begin to deter qualified individuals from entering public service, the public should consider an initiative to enact protections for public employee privacy. Much like peace officers, who have been

given additional privacy protections under the Public Safety Officers Procedural Bill of Rights¹⁴⁶ and under California Penal Code sections 832.7 and 832.8,¹⁴⁷ public employees could be given protections from disclosure in certain areas that the public deems would not undermine government transparency.

Even if the recent appellate reversals in *Smith* and *LAUSD* mark an end to the trend of narrowing of public employee privacy, perhaps we have already gone too far and should implement protections for public employees. As discussed above,¹⁴⁸ public employees are vulnerable to privacy infringement by commercial entities seeking employees' private information under the Public Records Act for targeted demographic marketing purposes. This pure commercialism was not contemplated by the enactment of the CPRA and is a perversion of the Act's purpose. While cases disputing disclosure under facts that do not demonstrate a genuine public interest in disclosure, and only have shameless profiteering behind the request, would certainly fail a balancing test if challenged in court, public employees should be protected from this sort of capitalism run amok with an amendment to the CPRA intended to correct for this blind spot in the Act.

CONCLUSION

Since the enactment of the CPRA, the Act has been used by California courts as a device to hold public officials accountable to the public and to increase government transparency. However, public employee privacy, a concern the Act originally purported to be aimed to protect, has been compromised in the process. Time will tell if the courts will continue this trend of weighing the public's desire to monitor the government's inner workings over the privacy interests of public employees. In the event of future restrictions on employee privacy, similar to those we have seen thus far, it may be time for the public to demand a true balance be struck that will further the aim for "sunshine" without the high cost to the privacy rights of public employees.

¹⁴⁶ Public Safety Officers Procedural Bill of Rights, CAL. GOV'T CODE §§ 3300–3313 (West 2014).

¹⁴⁷ CAL. PENAL CODE §§ 832.7–832.8 (West 2014).

¹⁴⁸ See *supra* text accompanying notes 4–7.

